91-86

Supreme Court, U.S.
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No.____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

E. LEE COX and BECKY COX, d/b/a

PIXY PALS KENNEL, Petitioner

v.

UNITED STATES DEPARTMENT

OF AGRICULTURE, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 9, 1991

QUESTIONS PRESENTED

1. Whether a federal court of appeals, in reviewing a federal agency's action involving the alleged violation of a citizen's constitutional rights, should make an independent assessment of the agency's findings under 5 U.S.C. §706 (2)(B), rather than afford primary deference to the agency's findings.

2. Whether the Eighth Circuit Court of Appeals properly affirmed the finding of the Department of Agriculture that petitioners had intentionally and willfully violated the Animal Welfare Act. (Emphasis added).[1]

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[1] Petitioner reserves the right to argue Question 2 in the event certiorari is granted on Question 1, but does not include Question 2 as a reason for the grant of certiorari.

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v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, E. Lee Cox and Becky Cox, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on February 13, 1991. Petition for rehearing denied April 10, 1991.

OPINIONS BELOW

The decision of the United States Department of Agriculture (Bernstein, A.L.J.) has not been reported. It is reprinted in the appendix hereto, page, 23, , infra.

The decision of the United States Department of Agriculture (Campbell, J.O.) has not been reported. It is reprinted in the appendix hereto, page 37 infra.

The opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the appendix hereto, page 55, infra.

JURISDICTION

Petitioners seek review of the decree of the United States Court of Appeals for the Eighth Circuit issued February 13, 1991. A timely petition for rehearing was filed with the Eighth Circuit, and was denied by an order entered April 10, 1991.

The jurisdiction of the Supreme Court to review the judgment and decree of the Eighth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

5 U.S.C. §706 (1988). Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

The petitioners, Lee Cox and Becky Cox at the time of the offense charged, jointly owned and operated Pixy Pals Kennel. Pixy Pals is engaged in the business of breeding dogs for resale to brokers and pet stores throughout the country. It is one of the largest kennel operations in Nebraska with gross sales of over $1 million dollars per year. The business is currently managed by Becky Cox alone.

This case was instituted by a Complaint filed on September 17, 1987 by the Administrator of the Animal and Plant Health Inspection Service (APHIS), which began investigating the Coxes in 1985 for suspected violations of the Animal Welfare Act (AWA), 7 U.S.C. §§2131-2156 (1982), and accompanying regulations.

In January 1988, APHIS investigator Bob Wells arrived unannounced to inspect the petitioner's facility and records. Because of the parties long standing political dispute, petitioner Lee Cox told Wells to leave, and advised Wells to make an appointment at least two weeks in advance if he wanted any information. While there was no physical contact, Lee Cox also told Wells that "You people

are just like the Gestapo...you're just like the Communists...leave and don't ever come back." The Coxes also sent a letter to APHIS stating that APHIS had no right to enter their property without their written approval and again demanded two weeks notice before any inspection. Copies of this letter were also sent by the Coxes to other dog breeders and pet store owners, urging them to sign the letter and send it to APHIS. The Coxes previously published at least one newsletter addressed to the same audience and critical of the Department, referring to the American Kennel Club's "communist conspirator friends at U.S.D.A.". All of the above statements or publications were offered and received as evidence against the Coxes at the hearings before the Department of Agriculture.

An Amended Complaint was filed by APHIS on May 10, 1988, alleging that the petitioners had willfully violated the AWA and the regulations issued pursuant to the Act, 9 CFR 1.1-22.120.

Pursuant to an administrative hearing held in December, 1988, Administrative Law Judge Edwin S. Bernstein issued an Initial Decision and Order on April 20, 1989. The Administrative Law Judge specifically found the

Coxes had committed forty-one technical violations[2] of the AWA and its regulations, as follows: (1) twelve violations of 9 C.F.R. § 2.130 (delivering dogs less than eight weeks old to carriers for transportation in commerce); (2) thirteen violations of 7 U.S.C § 2135 and 9 C.F.R. § 2.101, (failure to hold dogs at least five days after acquisition); (3) fifteen violations of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75, (failure to maintain accurate records; and (4) one violation of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126, (refusing to permit APHIS officials to inspect the facilities.) All violations, with the exception of the failure to permit inspection, took place during 1985. None of the violations involved any cruelty to animals or unsanitary kennel conditions. Although petitioners had no prior record of any violations whatsoever, the order suspended the petitioner's license for 90 days, and thereafter until petitioner's demonstrated compliance with the Act and regulations, and also assessed a civil penalty of $12,000.

In June, 1989, petitioners appealed to the Judicial Officer in a proceeding before the United States Department

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[2] While the violations were forty-one in number, they involved only six sales transactions of the kennel business which handles hundreds of such transactions each year.

of Agriculture (USDA), Secretary of Agriculture, authorized to decide such cases pursuant to 5 U.S.C. §§556 and 557 and C.F.R. 2d 2.35. The decision and order of the Judicial Officer was issued on January 29, 1990. In his decision, the Judicial Officer essentially affirmed the findings of fact and conclusions of law issued by the Administrative Law Judge.

From that order, petitioners filed and were granted a Petition for Review with the Eighth Circuit Court of Appeals on March 8, 1990, invoking jurisdiction under 7 U.S.C. §2149(c), which authorizes the appeal of a final order of the Secretary of Agriculture within 60 days after entry of such order, pursuant to the provisions of 28 U.S.C §§2341, 2343-2350. Oral arguments followed on November 14, 1990, and a judgment in favor of the Department of Agriculture was issued on February 13, 1991.

In its decision, the Eighth Circuit agreed with the USDA that its decision "(M)ust be upheld if it is supported by substantial evidence." (App. 62). The court applied this standard of review both to the finding of willfullness on the part of the petitioners in violating the AWA (App. 64), as well as to the petitioner's contention that they were being punished for exercising their First Amendment rights This

was done despite the fact that the court noted nothing more than an "implicit finding" by the USDA that its actions were motivated only by "legitimate enforcement concerns." (App. 67).

The petitioners supported their contention that the USDA had retaliated against them by noting the testimony at the hearing of two APHIS inspectors, who discussed the content and impact of the petitioners mailings on their efforts to inspect other kennels. Particularly cited was the testimony of Inspector Bob Wells, which included the following remarks:

> And, it makes it difficult, not only in Nebraska, but in surrounding states, for the USDA to carry out their requirements for enforcing the requirements of the Animal Welfare Act. And you know, one of the reasons why it's essential that whatever action is taken as a result of this, you know, that it be severe...Brokers, dealers are stepping back and watching and they're, we know that if what happens as a result here is that they get a slap on the wrist, or a small fine, or whatever, and let offf, that is going to make it difficult for us to enforce the requirements of the regulations.

The petitioners noted that the Administrative Law Judge mentioned Mr. Cox's abusive remarks to the APHIS inspector in his

opinion, which remarks were incorporated in the opinion of the Hearing Officer. The Eighth Circuit accepted the USDA's explanation that this testimony indicated only the investigator's concern for effective enforcement of the AWA, as opposed to any desire to retaliate against the Coxes for criticism of its personnel and methods, as the petitioners contended. (App. 69) Rather than examining the substance of the petitioner's allegations, the court sympathized with the USDA, saying that "If, by refusing to allow inspections and publicly critizing the Department, the Coxes could successfully defy the Department and get away with suspected AWA violations, other kennel owners would follow suit." (App. 69).

Petitioners filed a timely notice for rehearing , which was denied without comment on April 10, 1991. (App. 75)

REASONS FOR GRANTING THE WRIT

1.

The Eighth Circuit's deference to agency findings when reviewing a constitutional claim (a) conflicts with decisions not only of the Eighth Circuit but of other circuits as well as decisions of the Supreme Court, and (b) fails to apply the scope of review intended by Congress under the Administrative Procedures Act, 5 U.S.C. §706 (2)(B).

In refusing to apply an enlarged scope of review to an implicit finding by the Department of Agriculture that a citizen's constitutional rights were not violated, the Eighth Circuit has ignored both clearly established precedent as well as the intent of Congress as articulated in 5 U.S.C. §706 (2)(B) (1988) The court avoided such review by classifying the constitutional claim as a "question of fact" and applied an exceedingly deferential "substantial evidence" standard under 5 U.S.C §706 (2)(E) (1988), even though neither the Administrative Law Judge nor the Judicial Officer on

review made any specific findings of fact or conclusions of law related to the constitutional claim. Such a clear disregard for the protection of an individual's constitutional rights when dealing with an agency of the United States government deserves this Court's attention.

This decision by the Eighth Circuit directly conflicts with the mandate of this Court providing that "(W)here constitutional rights are in issue, an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case." Pickering v. Board of Education, 391 U.S. 563 (1968). So important is that mandate that this Court has held even the termination decisions of the Director of the Central Intelligence Agency, which due to national security concerns are generally precluded from judicial review, are not shielded from review when a possible constitutional violation is involved. Webster v. Doe, 108 S. Ct. 2047 (1988).

The decision below directly conflicts with the Fifth Circuit's holding that the intent of Congress in promulgating 5 U.S.C. §706 (2)(B) is that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision

making. Porter v. Califano, 592 F. 2d 770, 780 (5th Cir. 1979) The action of the Eighth Circuit clearly frustrates this intent, because it allows the court to avoid reviewing a constitutional claim merely by labeling it as a question of fact rather than law, without providing any basis for the distinction.

Also significantly relevant to this case, the Fifth Circuit noted that an error would be committed in rejecting a constitutional claim if there was even the possibility that a court may have relied on agency findings or deferred to agency rulings in reaching its decision. Id. (Emphasis added). This reasoning has also been followed by several courts of the various circuits. Coleman v. Lyng, 653 F. Supp. 1315, 1330 (D. N.D. 1987); United States v. Mears, 627 F. Supp. 247, 256 (D. S.D. 1985); Waters v. Chaffin, 684 F. 2d 833, 839-49 (11th Cir. 1982); Tygrett v. Barry, 627 F. 2d 1279, 1283 (D.C. Cir. 1980). By employing a substantial evidence standard of review in the instant case, it is clear that such erroneous deference was given to agency findings

What is even more disturbing is that the Eighth Circuit itself has previously criticized such an approach. In noting that a dichotomy between the application of an

essentially de novo standard of review and one affording greater deference to an agency's findings has developed in this Court , the Eighth Circuit stated that it was "(C)onvinced that the standard applied should turn on practical policy considerations of the comparative qualifications and competence of courts and agencies." Maloley v. R.J. O'Brien & Assoc., Inc., 819 F. 2d 1435, 1441 (8th Cir. 1987). The court went on to clarify these qualifications: "(I)f the issue falls outside the area generally entrusted to the agency, and is one in which the courts have special competence, i.e. the common law or the constitutional law, there is little reason for the judiciary to defer to an administrative interpretation." Id., quoting Hi-Craft Clothing Co. v. N.L.R.B., 660 F. 2d 910, 915 (3d Cir. 1981). However, in this case the Eighth Circuit skirted the issue, acknowledging that while questions of constitutional law are reviewed de novo, whether the petitioner's rights were violated depended upon the motivation of the Department of Agriculture, and was therefore a question of fact to be reviewed under a "substantial evidence "standard. (App. 67) This Court has rejected such an approach, stating that judicial scrutiny is necessary "(E)ven if any deterrent

effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." Buckley v. Valeo, 424 U.S. 1, 64-65 (1976).

Equally in conflict and particularly relevant here is Hill v. National Transportation Safety Board, 886 F.2d 1275 (10th Cir. 1989). In upholding the suspension of a helicopter pilot's license by the Federal Aviation Administration, the Tenth Circuit applied the substantial evidence standard to most of the agency's findings, but refused to do so when reviewing the pilot's assertion of first and seventh amendment claims, stating that they must be reviewed de novo by the court. The fact that the pilot had already been afforded a hearing before an Administrative Law Judge and an appeal to the National Transportation Safety Board did nothing to reduce the standard of review which was applicable at the appellate court level. Yet, in the instant case, the Eighth Circuit panel applied the more limited standard of review even though admitting the record contained nothing more than an "implicit finding" by the Department of Agriculture that the petitioners were not

retaliated against for the exercise of their First Amendment rights. (App. 67)

Further support of the judiciary as the preferred forum for assessing constitutional claims is found in Rydeen v. Quig, 748 F. Supp. 900 (D.D.C. 1990). There the District Court for the District of Columbia recognized, as did the Fifth Circuit in Porter, that because constitutional claims may be brought directly under the constitution as well as under the Administrative Procedures Act, in either instance the court has the authority to examine and rule on any actions of a federal agency which may violate the constitution. The Porter court specifically noted that deference need not be accorded to an agency's decisions because "(T)he courts, and not the agencies, are experts on the constitution." Porter at 780 n.15. Petitioner submits that such a standard should have been applied in this case., where a specific First Amendment issue had been raised by the parties' conduct.

This Court has long recognized that any infringement of freedom of speech must be closely scrutinized. Speiser v. Randall, 357 U.S. 513 (1958); Elrod v. Burns, 427 U.S. 347 (1976). In order to insure that lower

courts uniformly apply such scrutiny when reviewing agency findings rather than simply give "lip service" to the idea, the review by this Court of the Eighth Circuit's decision is urgently needed. Such a ruling would clarify both the inconsistent standard applied within the Eighth Circuit, as well as the variance throughout the several circuit court decisions noted by petitioner.

CONCLUSION

For these reasons, the petitioners pray that this petition for certiorari be granted. If petitioners are correct in urging that the Eighth Circuit applied an incorrect scope of review to their constitutional claims, petitioners reiterate they wish to argue Question 2, not as a reason for granting ceritorari, but because this is the only opportunity for petitioner to seek review of the Eighth Circuit's finding of willfulness on their part in committing any violations of the Animal Welfare Act.

July 9, 1991

Respectfully Submitted,
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APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	)	AWA DOCKET NO. 434
E. LEE COX and BECKY COX,	)	
d/b/a PIXY PALS KENNEL,	)	
	)	
Respondents.	)	

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. 2131-2156 (the Act), instituted by a Complaint filed on September 10, 1987, by the Administrator of the Animal and Plan Health Inspection Service (APHIS), United States Department of Agriculture. Complainant filed an amended Complaint on May 10, 1988. The Amended Complaint alleges that Respondents willfully violated the Act and the regulations issued pursuant to the Act at 9 C.F.R. 1.1-2.130. On June 2, 1988,

Respondents filed an Answer to the Amended Complaint in which they disputed the substantive allegations. A hearing was held before me in North Platte, Nebraska on December 20 and 21, 1988.[1] The parties filed proposed findings of fact, proposed conclusions of law and briefs. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. E. Lee Cox and Becky Cox are partners doing business as Pixy Pals Kennel at Route 2, Post Office Box 235, Stratton, Nebraska 69043. (Answer, par. 1)

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[1] The first day's transcript pages were numbered 1 through 121. Instead of beginning the numbering of the second day's transcript at page 122, a different court reporter numbered those pages 1 through 101. To distinguish the page numbers in this Decision, the pages of the first day's transcript will be designated as TR I- (page number) and the pages of the second day will be designated as TR-II- (page number). Complainant's exhibits will be designated as CX- and Respondent's exhibits will be designated as RX-.

2. At all times material, Respondents operated as a dealer as defined in the Act and held Class B license number 473-47 issued under the Act. At the time they applied for the license, Respondents were given a copy of the regulations and standards promulgated under the Act and agreed in writing to comply with the regulations and standards. (Answer, par. 1)

3. Respondents delivered dogs under eight weeks of age to carriers for transportation in commerce as follows:

a. On March 19, 1985, Respondents shipped one dog and on March 21, 1985, Respondents shipped three dogs.. (TR I-83-87; CX 11, 12)

b. On March 28, 1985, Respondents shipped three dogs. (TR I-87-89; CX 13,14)

c. On May 8, 1985, Respondents shipped two dogs. (TR I-90-92; CX 15, CX 16)

d. On May 15, 1985, Respondents shipped three dogs. (TR I-91; CX 16)

4. Respondents failed to hold dogs that they acquired for at least five business days as follows:

a. On November 14, 1985, Respondents shipped in commerce two dogs which they had held for less than five business days. Respondents purchased five basset puppies from Green Meadow Kennels on November 11, 1985. Marjorie Wells, who managed the kennels, testified that the purchase was made on November 11, 1985. (TR I-11-12) Green Meadow's ledger page (CX 1) and a canceled check from Pixy Pals (CX 2) also indicate that the purchase was made on November 11. Although Respondents' records (CX 22 and 23) list the purchase date as November 7, 1985, I find Mrs. Wells' testimony, Green Meadows records and the date on Respondents' check to be more persuasive. Respondents' records (CX 20) indicate that two of the dogs were shipped on November 14, 1985, less than five days after they were acquired. (TR II-7-17)

b. On November 21, 1985, Respondents shipped in commerce one dog which they had held for less than five business days. Mrs. Dorothy Stoner testified that her daughter, Pam Stoner, sold three Cocker Spaniel puppies to Respondents and that Respondents picked up the dogs and paid by check on the date of the check. (TR I-25-29) Respondents' check was dated November 18, 1985. (CX 3) Although Respondents' records (CX 25) indicate that Respondents obtained the dogs on November 15, 1985, I find that the dogs were, in fact, picked up and paid for on November 18, 1985, as Mrs. Stoner's testimony and the canceled check (CX 3) indicate. Respondents' records indicate that they shipped one of the puppies on November 21, 1985, less than five business days after Respondent obtained the puppy. (CX 25, 26)

c. On December 6, 1985, Respondents shipped in commerce six dogs which Respondents had held for less than five business days. Ms. Sheila Tacl testified that on December 2, 1985, she sold six rottweiler puppies to Respondents. Ms. Tacl's records (CX 6) as well as a copy of Respondents' check to Ms. Tacl (CX 7) corroborate that the

sale was made on December 2, 1985. Respondents' records (CX 29) show that Respondents shipped the puppies on December 6, 1985, less than five e business days after Respondents acquired the puppies.

d. On December 31, 1985, Respondents shipped in commerce four dogs which Respondents had held for less than five days. Ms. Rosella Twidwell testified that she sold four Chihauhua puppies to Respondents on December 9, 1985. (TR I-59) Respondents' records (CX 8) confirmed that the sale was on December 9, 1985 and a copy of Respondents' check to Ms. Twidwell (CX 9) was dated December 10, 1985. Respondents' records show that Respondents shipped the dogs on December 13, 1985, less than five business days after Respondents acquired the puppies. (CX-32)

5. Respondents falsified records and failed to keep and maintain records which fully and correctly disclose the necessary information concerning dogs purchased, acquired, held, or otherwise in their possession and control.

a. Respondents' records show that they purchased eight dogs from Green Meadow Kennels on November 7, 1985, when, in fact, they purchased these dogs on November 11, 1985. (TR I-8-18; TR II-7-17; CX 1, 2, 22, 24)

b. Respondents' records show that they purchased three dogs from Ms. Pamela Stoner on November 15, 1985, when, in fact, they purchased those dogs on November 18, 1985. (TR I-24-29; TR II-20-24; CX 3, 25, 26)

c. Respondents' records show that they purchased four dogs from Ms. Rosella Twidwell on December 8, 1985 when, in fact, they purchased those dogs on December 9, 1985. (TR I-58-62; TR II-40-43; CX 8, 9, 32)

6. On January 27, 1988, Respondents refused to permit APHIS officials to inspect their facility and records. Bob Wells, an APHIS investigator, testified that on January 27, 1988 he visited Respondents' premises to inspect their records. Respondent Lee Cox told Mr. Wells that he was not welcome and asked him to leave immediately. (TR II-94) As Mr. Wells walked to his car, Mr. Cox made some abusive

remarks including "you people are just like the Gestapo . . . you're just like the Communists . . . get out of here and don't ever come back." (TR II-95) In addition, Mr. Cox told Mr. Wells that if he wanted any information, he must make an appointment at least two weeks in advance and then Respondents would see if they had time for him. (TR II-94)

7. Respondents are one of the largest dog brokers in the State of Nebraska. They reported gross income from the sale of animals of $1,123,000 from April 1985 to April 1986; $1,772,000 from April 1, 1986 to April 1, 1987, and $2,711.046.40 from April 1, 1987 to April 1, 1988. (CX 10)

Conclusions of Law

1. Respondents violated 9 C.F.R. 2.130 by delivering to carriers for transportation in commerce dogs that were less than eight weeks of age.

2. Respondents violated 7 U.S.C. 2135, and 9 C.F.R. 2.101 by failing to hold dogs for at least five business days after they acquired the dogs.

3. Respondents violated 7 U.S.C. 2140 and 9 C.F.R. 2.75 by failing to keep and maintain accurate records.

4. Respondents violated 7 U.S.C. 2146 and 9 C.F.R. 2.126 by refusing to permit APHIS officials to inspect their facility and records on January 27, 1988.

5. The requested sanction, which includes a civil penalty of $12,000 and a suspension of Respondents' license for 90 days, is appropriate.

Respondents' delivery of dogs under eight weeks of age to carriers for transportation in commerce is a serious violation which warrants a strict sanction, In re Stuekerjuergen, 44 Agric. Dec. 186, 189 (1985). In that case, it was explained that "the minimum age requirement is based on a finding by the Secretary that shipment of dogs under 8 weeks of age adversely affects 'the animal's ability to function its adult environment,' and is, therefore, inhumance." In this case, Respondents repeatedly delivered dogs under eight weeks of age to carriers for

shipment to pet stores in other states. Shipping underage animals to distant locations subjects the animals to great stress. Respondents' claim that they were led to believe by the unlicensed dealers from whom they purchased the dogs that the dogs were already eight weeks old does not mitigate the violations. In re Stuekerjuergen, supra at 190.

Respondents' violations of the five-day holding period requirement and falsification of records are also serious violations which warrant a serious sanction. The five-day holding period is particularly important for dealers who buy from unlicensed sources since USDA does not know the existence of the unlicensed sources and has no way of ascertaining what conditions the animals have been raised in and whether the animals are healthy when purchased by the dealers (TR I-67) Respondents' failure to comply with this holding period requirement greatly increases the likelihood that animals raised in substandard conditions will be placed in commerce without being monitored for health problems. In addition, Respondents falsified records to conceal these violations. Accurate record keeping by dealers is absolutely vital to the effective

administration of the Animal Welfare Act. "It is therefore the duty of the Secretary of Agriculture to strictly enforce these requirements under the Act and severely sanction those who repeatedly violate them." In re Vrana, 43 Agric. Dec. 1758, 1764 (1984); see also In re Hickey, 47 Agric. Dec. ____, AWA Docket No. 369 (Judicial Officer's Decision and Order, May 27, 1988).

Respondents' deliberate refusal to allow an APHIS official to inspect their records after APHIS officials had uncovered Respondents' record keeping and holding violations is also a serious violation of the Act and regulations. In re Hickey, supra.

The violations were willful. A willful violation is defined as where the violator either intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts which careless disregard of statutory requirements. In re Arab Stockyard, Inc., 37 Agric. Dec. 293, 306 (1978), aff'd. sub nom Arab Stockyard v. United States, 582 F.2d 39 (?) (Carcir 1978)

Order

Respondents E. Lee Cox and Becky Cox, their agents and employees, directly or through any corporate or other device, shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. 2131-2156, and its regulations at 9 C.F.R. 1.1-2.130, and shall cease and desist from any violations of the Act and regulations including:

1. Failing to retain possession and control of all dogs until such animals are at least eight weeks of age and have been weaned as required by 9 C.F.R. 2.130; and

2. Failing to hold dogs for a period of not less than five business days after acquisition of such animals as required by 7 U.S.C. 2135 and 9 C.F.R. 2.101;

3. Failing to keep and maintain records which fully and correctly disclose the necessary information concerning dogs purchased, acquired, held, or otherwise in their possession and control as required by 7 U.S.C. 2140 and 9 C.F.R. 2.75; and

4. Failing to allow APHIS officials to inspect Respondents' facility and records as required by 7 U.S.C. 2146 and 9 C.F.R. 2.126.

Respondents E. Lee Cox and Becky Cox are assessed a civil penalty of $12,000 to be paid by certified check or money order payable to the Treasurer of the United States.

Respondents' license is suspended for 90 days and thereafter until Respondents' demonstrate to APHIS that their activities comply with the Act and its regulations and standards. When Respondents demonstrate to APHIS that they are in compliance with the Act and its regulations and standards, a supplemental order terminating the suspension will be issued upon motion of APHIS.

This Order shall become final and effective 35 days after service of this Decision and Order upon Respondents, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. Section 1.145).

EDWIN S. BERNSTEIN

Administrative Law Judge

April 20, 1989

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	)	AWA DOCKET NO. 434
E. LEE COX and BECKY COX,	)	
d/b/a PIXY PALS KENNEL,	)	DECISION AND
	)	ORDER
Respondents.	)	

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. Sections 2131-2156). On April 20, 1989, Administrative Law Judge Edwin S. Bernstein (ALJ) issued an initial Decision and Order suspending respondents' license for 90 days, and thereafter until respondents demonstrate compliance with the Act and regulations, assessing a civil penalty of $12,000, and directing respondents to cease and desist from failing to retain possession and control of all dogs until they are a least 8 weeks of age and have been weaned, failing to hold dogs for not less than 5 business days after acquisition,

failing to keep and maintain proper records, and failing to allow inspection of respondents' facility and records.

On June 5, 1989, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. Sections 556 and 557 (7 C.F.R. Section 2.35)* . The case was referred to the Judicial Officer for decision on August 11, 1989.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few minor changes in brackets. The effective date of the order has been changed, in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. Sections 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Req. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. 2131-2156 (the Act), instituted by a Complaint filed on September 10, 1987 by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. Complainant filed an amended Complaint on May 10, 1988. The Amended Complaint alleges that Respondents willfully violated the Act and the regulations issued pursuant to the Act at 9 C.F.R. 1.1-2.130. On June 2, 1988, Respondents filed an Answer to the Amended Complaint in which they disputed the substantive allegations. A hearing was held before me in North Platte, Nebraska on December 20 and 21, 1988.[1] The parties fileD proposed findings of fact, proposed conclusions of law and briefs. All proposed findings,

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1 The first day's transcript pages were numbered 1 through 121. Instead of beginning the numbering of the second day's transcript at page 122, a different court reporter numbered those pages 1 through 101. To distinquish the page numbers in this Decision, the pages of the first day's transcript will be designated as TR I-(page number) and the pages of the second day will be designated as TR-II (page number). Complainant's exhibits will be designated as CX- and Respondents' exhibits will be designated as RX-.

proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

FINDINGS OF FACT

1. E. Lee Cox and Becky Cox are partners doing business as Pixy Pals Kennel at Route 2, Post Office Box 235, Stratton, Nebraska 69043. (Answer, par. 1)

2. At all times material, Respondents operated as a dealer as defined in the Act and held Class B license number 473-47 issued under the Act. At the time they applied for the license, Respondents were given a copy of the regulations and standards promulgated under the Act and agreed in writing to comply with the regulations and standards. (Answer, par. 1)

3. Respondents delivered dogs under eight weeks of age to carriers for transportation in commerce as follows:

a. On March 19, 1985, Respondents shipped one dog and on March 21, 1985, Respondents shipped three dogs. (TR I-83-87; CX 11, 12)

b. On March 28, 1985, Respondents shipped three dogs. (TR I-87-89; CX 13,14)

c. On May 8, 1985, Respondents shipped two dogs. (TR I-90-92; CX 15, CX 16)

d. On May 15, 1985, Respondents shipped three dogs. (TR I-91; CX 16)

4. Respondents failed to hold dogs that they acquired for at least five business days as follows:

a. On November 14, 1985, Respondents shipped in commerce two dogs which they had held for less than five business days. Respondents purchased five basset puppies from Green Meadow Kennels on November 11, 1985. Marjorie Wells, who managed the kennels, testified that the purchase was made on November 11, 1985. (TR I-11-12)

Green Meadow's ledger page (CX 1) and a canceled check from Pixy Pals (CX 2) also indicate that the purchase was made on November 11. Although Respondents' records (CX 22 and 23) list the purchase date as November 7, 1985, I find Mrs. Wells' testimony, Green Meadows records and the date on Respondents' check to be more persuasive. Respondents' records (CX 2[2]) indicate that two of the dogs were shipped on November 14, 1985, less than five days after they were acquired. (TR II-7-17)

b. On November 21, 1985, Respondents shipped in commerce one dog which they had held for less than five business days. Mrs. Dorothy Stoner testified that her daughter, Pam Stoner, sold three Cocker Spaniel puppies to Respondents and that Respondents picked up the dogs and paid by check on the date of the check. (TR I-25-29) Respondents' check was dated November 18, 1985. (CX 3) Although Respondents' records (CX 25) indicate that Respondents obtained the dogs on November 15, 1985, I find that the dogs were, in fact, picked up and paid for on November 18, 1985, as Mrs. Stoner's testimony and the canceled check (CX 3) indicate. Respondents' records

indicate that they shipped one of the puppies on November 21, 1985, less than five business days after Respondent obtained the puppy. (CX 25, 26)

c. On December 6, 1985, Respondents shipped in commerce six dogs which Respondents had held for less than five business days. Ms. Sheila Tacl testified that on December 2, 1985, she sold six rottweiler puppies to Respondents. Ms. Tacl's records (CX 6) as well as a copy of Respondents' check to Ms. Tacl (CX 7) corroborate that the sale was made on December 2, 1985. Respondents' records (CX 29) show that Respondents shipped the puppies on December 6, 1985, less than five e business days after Respondents acquired the puppies.

d. On December 31, 1985, Respondents shipped in commerce four dogs which Respondents had held for less than five days. Ms. Rosella Twidwell testified that she sold four Chihauhua puppies to Respondents on December 9, 1985. (TR I-59) Respondents' records (CX 8) confirmed that the sale was on December 9, 1985 and a copy of Respondents' check to Ms. Twidwell (CX 9) was dated

December 10, 1985. Respondents' records show that Respondents shipped the dogs on December 13, 1985, less than five business days after Respondents acquired the puppies. (CX-32)

5. Respondents falsified records and failed to keep and maintain records which fully and correctly disclose the necessary information concerning dogs purchased, acquired, held, or otherwise in their possession and control.

a. Respondents' records show that they purchased eight dogs from Green Meadow Kennels on November 7, 1985, when, in fact, they purchased these dogs on November 11, 1985. (TR I-8-18; TR II-7-17; CX 1, 2, 22, 24)

b. Respondents' records show that they purchased three dogs from Ms. Pamela Stoner on November 15, 1985, when, in fact, they purchased those dogs on November 18, 1985. (TR I-24-29; TR II-20-24; CX 3, 25, 26)

c. Respondents' records show that they purchased four dogs from Ms. Rosella Twidwell on December 8, 1985

when, in fact, they purchased those dogs on December 9, 1985. (TR I-58-62; TR II-40-43; CX . . . 9, 32 [see, also, Ms. Twidwell's record, CX 8])

6. On January 27, 1988, Respondents refused to permit APHIS officials to inspect their facility and records. Bob Wells, an APHIS investigator, testified that on January 27, 1988 he visited Respondents' premises to inspect their records. Respondent Lee Cox told Mr. Wells that he was not welcome and asked him to leave immediately. (TR [I]-94) As Mr. Wells walked to his car, Mr. Cox made some abusive remarks including "you people are just like the Gestapo . . . you're just like the Communists . . . get out of here and don't ever come back." (TR [I]-95) In addition, Mr. Cox told Mr. Wells that if he wanted any information, he must make an appointment at least two weeks in advance and then Respondents would see if they had time for him. (TR [I]-94)

7. Respondents are one of the largest dog brokers in the State of Nebraska. They reported gross income from the sale of animals of $1,123,000 from April 1985 to April 1986;

$1,772,000 from April 1, 1986 to April 1, 1987, and $2,711.046.40 from April 1, 1987 to April 1, 1988. (CX 10)

Conclusions of Law

1. Respondents violated 9 C.F.R. 2.130 by delivering to carriers for transportation in commerce dogs that were less than eight weeks of age.

2. Respondents violated 7 U.S.C. 2135, and 9 C.F.R. 2.101 by failing to hold dogs for at least five business days after they acquired the dogs.

3. Respondents violated 7 U.S.C. 2140 and 9 C.F.R. 2.75 by failing to keep and maintain accurate records.

4. Respondents violated 7 U.S.C. 2146 and 9 C.F.R. 2.126 by refusing to permit APHIS officials to inspect their facility and records on January 27, 1988.

5. The requested sanction, which includes a civil penalty of $12,000 and a suspension of Respondents' license for 90 days, is appropriate.

Respondents' delivery of dogs under eight weeks of age to carriers for transportation in commerce is a serious violation which warrants a strict sanction, In re Stuekerjuergen, 44 Agric. Dec. 186, 189 (1985). In that case, it was explained that "the minimum age requirement is based on a finding by the Secretary that shipment of dogs under 8 weeks of age adversely affects 'the animal's ability to function its adult environment,' and is, therefore, inhumance." In this case, Respondents repeatedly delivered dogs under eight weeks of age to carriers for shipment to pet stores in other states. Shipping underage animals to distant locations subjects the animals to great stress. Respondents' claim that they were led to believe by the unlicensed dealers from whom they purchased the dogs that the dogs were already eight weeks old does not mitigate the violations. In re Stuekerjuergen, supra at 190.

Respondents' violations of the five-day holding period requirement and falsification of records are also serious violations which warrant a serious sanction. The five-day holding period is particularly important for dealers who buy from unlicensed sources since USDA does not know the existence of the unlicensed sources and has no way of ascertaining what conditions the animals have been raised in and whether the animals are healthy when purchased by the dealers (TR I-67) Respondents' failure to comply with this holding period requirement greatly increases the likelihood that animals raised in substandard conditions will be placed in commerce without being monitored for health problems. In addition, Respondents falsified records to conceal these violations. Accurate record keeping by dealers is absolutely vital to the effective administration of the Animal Welfare Act. "It is therefore the duty of the Secretary of Agriculture to strictly enforce these requirements under the Act and severely sanction those who repeatedly violate them." In re Vrana, 43 Agric. Dec. 1758, 1764 (1984); see also In re Hickey, 47 Agric. Dec. ____, AWA Docket No. 369 (Judicial Officer's Decision and

Order, May 27, 1988) [, aff'd, 878 F.2d 385 (9th Cir. 1989) (unpublished).].

Respondents' deliberate refusal to allow an APHIS official to inspect their records after APHIS officials had uncovered Respondents' record keeping and holding violations is also a serious violation of the Act and regulations. In re Hickey, supra.

The violations were willful. A willful violation is defined as [one] where the violator either intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts which careless disregard of statutory requirements. In re Arab Stockyard, Inc., 37 Agric. Dec. 293, 306 (1978), aff'd. sub nom Arab Stockyard v. United States, 582 F.2d 39 ([5th Cir.] 1978)

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend that the evidence does not adequately support the ALJ's findings of fact, including his

finding of wilfulness, but there is much more than a preponderance of the evidence, which is all that is required.[2] The evidence is very carefully and accurately discussed in Complainant's Response to Appeal Petition, and no useful purpose would be served by rehashing that discussion here. Furthermore, the ALJ's severe sanction is entirely warranted by the serious violations found here, and it is consistent with the sanctions imposed in other cases under the Act.

Respondents ask guidance as to whether advance notice of a record inspection must be given by the Department, but it is clear from the Act (7 U.S.C. Sections 2140, 2145(a)) and the regulations (9 C.F.R. Section 2.126) that dealers and other regulated persons are required to grant access to their records during ordinary business hours, without any advance notice from the Department.

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2 See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91.92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), aff'd, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.* 37 Agric. Dec. 1336, 1346 (1978), aff'd, No. 78-3134 (D.N.J. May 25, 1979), aff'd mem., 614 F.2d 770 (3d Cir. 1980).

Respondents further ask guidance as to how to compute the 5-day holding period, but there is no ambiguity in the Act and regulations.

Section 5 of the Act provides (7 U.S.C. Section 2135):

> No dealer or exhibitor shall sell or otherwise dispose of any dog or cat within a period of five business days after the acquisition of such animal or within such other period as may be specified by the Secretary . . .

Section 2.101(a) of the regulations provides (9 C.F.R. Section 2.101(a)):

> Any dog or cat acquired by a dealer [footnote omitted] or exhibitor shall be held by him, under his supervision and control, for a period of not less than 5 business days after acquisition of such animal . . .

Under the plain language of the Act and regulations, the holding period must consist of the first 5 full business days after the animals are acquired. The day of acquisition

and the day of disposition cannot be included in those 5 days. The day on which the animals are acquired is not a day after the animals are acquired. A part of a day is less than a day. Obviously, a period of 4 days and a part of a day is less than 5 days.

For the foregoing reasons, the following order should be issued.

Order

Respondents E. Lee Cox and Becky Cox, their agents and employees, directly or through any corporate or other device, shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. 2131-2156, and its regulations at 9 C.F.R. 1.1-2.130, and shall cease and desist from any violations of the Act and regulations including:

1. Failing to retain possession and control of all dogs until such animals are at least eight weeks of age and have been weaned as required by 9 C.F.R. 2.130; and

2. Failing to hold dogs for a period of not less than five business days after acquisition of such animals as required by 7 U.S.C. Section 2135 and 9 C.F.R. Section 2.101;

3. Failing to keep and maintain records which fully and correctly disclose the necessary information concerning dogs purchased, acquired, held, or otherwise in their possession and control as required by 7 U.S.C. Section 2140 and 9 C.F.R. Section 2.75; and

4. Failing to allow APHIS officials to inspect Respondents' facility and records as required by 7 U.S.C. Section 2146 and 9 C.F.R. Section 2.126.

Respondents E. Lee Cox and Becky Cox are assessed a civil penalty of $12,000 to be paid no later than the 90th day after service of this order, by certified check or money order payable to the Treasurer of the United States, and sent to Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014, South Building, Washington, D.C. 20250-1400.

Respondents' license is suspended for 90 days and thereafter until Respondents' demonstrate to APHIS that their activities comply with the Act and its regulations and standards. When Respondents demonstrate to APHIS that they are in compliance with the Act and its regulations and standards, a supplemental order terminating the suspension will be issued upon motion of APHIS.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondents, and the suspension provisions of this order shall become effective on the 30th day after service of this order on respondents.

Done at Washington, D.C.

January 29, 1990

Donald A. Campbell

Judicial Officer

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

IN RE:	) NO. 90-1384
E. LEE COX and BECKY COX,	)
d/b/a PIXY PALS KENNEL,	)
Petitioners,	)
vs.	)PETITIONER FOR
	)REVIEW OF ORDER
UNITED STATES DEPARTMENT	)OF UNITED STATES
OF AGRICULTURE,	)DEPARTMENT OF
Respondents.	) AGRICULTURE

This cause was submitted on the petition for review of an order of the United States Department of Agriculture, administrative record, appendix, briefs of the parties and was argued by counsel.

After consideration, it is hereby adjudged and decreed that the order of the United States Department of Agriculture is affirmed in accordance with the opinion of this Court.

February 13, 1991

A true copy.

ATTEST: ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

IN RE:	)	NO. 90-1384
	)	
E. LEE COX and BECKY COX,	)	
d/b/a PIXY PALS KENNEL,	)	PETITION FOR
Petitioners,	)	REVIEW OF AN
vs.	)	ORDER OF THE
UNITED STATES DEPARTMENT	)	UNITED STATES
OF AGRICULTURE,	)	DEPARTMENT
	)	OF AGRICULTURE

Submitted: November 14, 1990

Filed: February 13, 1991

Before ARNOLD and MAGILL, Circuit Judges, and BATTEY*, District Judge.

* THE HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

MAGILL, Circuit Judge

Lee and Becky Cox, owners of Pixy Pals Kennel, petition for review of a decision of the Department of Agriculture suspending their license for ninety days, imposing a $12,000 civil fine, and ordering the Coxes to cease and desist from specified violations of the Animal Welfare Act. The Coxes claim that (1) the suspension violated Section 558(c) of the Administrative Procedure Act because there was insufficient evidence to support the Department's finding that their violations of the Animal Welfare Act were willful; (2) they were unconstitutionally penalized for exercising their first amendment rights; and (3) the sanctions imposed on them were excessive. We affirm.

I.

The Coxes, at the time relevant to this action, jointly owned and operated Pixy Pals Kennel.[1] Pixy Pals is one of the largest dog brokers in Nebraska and has a gross income of over $1 million per year. During 1985 the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) began investigating the Coxes for suspected violations of the Animal Welfare Act (AWA), 7 U.S.C. Sections 2131-2156 (1982), and accompanying regulations. In January 1988, an APHIS investigator, Bob Wells, arrived to inspect the facility and records. Lee Cox told him to leave and said that Wells would have to make an appointment at least two weeks in advance if he wanted any information. While escorting Wells to his car, Cox said, "you people are just like the Gestapo . . . you're just like the Communists . . . leave and don't ever come back." After this incident, the Coxes sent a letter to APHIS stating that APHIS had no right to enter their property without their express written approval and repeating their demand of two weeks' notice before any inspection could take place. The Coxes also sent copies of this letter to other dog breeders and pet store

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[1] The Coxes have since divorced, and Becky Cox now operates the kennel alone.

owners with a cover letter urging them to sign it and sent it to APHIS. The Coxes had earlier put out at least one newsletter critical of the Department and addressed to the same audience. That newsletter, although primarily devoted to criticism of the American Kennel Club, also referred to the A.K.C.'s "communistic conspirator friends at U.S.D.A."

The Department filed charges against the Coxes, and a hearing was held before an administrative law judge (ALJ) in December 1988. The ALJ found that the Coxes had committed forty-one violations of the AWA and its regulations, as follows: (1) twelve violations of 9 C.F.R. Section 2.130,[2] delivering dogs less than eight weeks old to carriers for transportation in commerce; (2) thirteen violations of 7 U.S.C. Section 2135 and 9 C.F.R. Section 2.101,[3] failure to hold dogs at least five days after

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2 Section 2.130 provides: "No dog or cat shall be delivered by any person to any carrier or intermediate handler for transportation, in commerce, or shall be transported in commerce by any person . . . unless such dog or cat is at least eight (8) weeks of age and has been weaned." 9 C.F.R. Section 2.130.

3 The statute provides: "No dealer or exhibitor shall sell or otherwise dispose of any dog or cat within a period of five business days after the acquisition of such animal or within such other period as may be specified by the Secretary . . . ." 7 U.S.C. Section 2135 (1988).

acquisition; (3) fifteen violations of 7 U.S.C. Section 2140 and 9 C.F.R. Section 2.75,[4] failure to maintain accurate records;[5] and (4) one violation[6] of 7 U.S.C. Section 2146 and 9 C.F.R. Section 2.126,[7] refusing to permit APHIS officials

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The regulation provides, in pertinent part: "Any live dog or cat acquired by a dealer or exhibitors shall be held by him or her, under his or her supervision and control, for a period of not less than 5 full days, not including the day of acquisition, after acquiring the animal, excluding time in transit." 9 C.F.R. Section 2.101(a) (footnote omitted).

[4] The statute provides, in pertinent part: "Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe." 7 U.S.C. Section 2140 (1982).

The regulation provides, in pertinent part: "Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired . . . . (v) The date a dog or cat was acquired . . .; (vi) (C) The date of birth or approximate age." 9 C.F.R. Section 2.75(a)(1).

[5] For (1) through (3), each dog involved in the offense counts as a separate violation.

[6] Even though the Coxes violated both the statute and the regulation, it counts as only one violation because the statute and regulation forbid the same conduct. The same principle holds for (2) and (3).

[7] The statute provides, in pertinent part: "The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer . . . has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer . . . ." 7 U.S.C. Section 2146 (1982).

The regulation provides, in pertinent part: "Each dealer . . . shall, during business hours, allow APHIS officials: (1) To enter its place of business; (2) To examine records required to be

to inspect the Pixy Pals facility and records. All of the violations except the failure to permit inspection took place during 1985. The ALJ ordered the Coxes to cease and desist from these violations, imposed a $12,000 fine on them, and suspended their license for ninety days. In addition, the suspension was to continue until they demonstrated compliance with the AWA and regulations.

The Coxes appealed to the Judicial Officer (JO) of the Department of Agriculture, who affirmed the ALJ's decision. The Coxes then petitioned this court for review. They ask that we set aside the JO's order or, in the alternative, modify the sanctions imposed.

II

The Department of Agriculture's decision must be upheld if it is supported by substantial evidence. Western States Cattle Co. v. United States Dep't of Agric., 880 F.2d 88, 89 (8th Cir. 1989); Farrow v. United States Dep't of Agric.,

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kept by the Act and the regulations in this part; (3) To make copies of the records; (4) To inspect and photograph the facilities, property and animals . . . ." 9 C.F.R. Section 2.126.

760 F.2d 211, 213 (8th Cir. 1985).[8] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

A. WILLFULNESS

The Coxes argue first that the evidence is insufficient to sustain a finding of willfulness, required under Section 558(c) of the Administrative Procedure Act before a suspension may be imposed. 5 U.S.C. Section 558(c) (1989). Willfulness, as both parties point out in their briefs, includes not only intent to do a prohibited act but also careless disregard of statutory requirements. Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); accord George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); Arab Stock Yard, Inc., 37 Agric. Dec. 293, 306 (1978), aff'd mem. 582 F.2d 39 (5th Cir. 1978); see

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[8] This standard of review comes from the Administrative Procedure Act, 5 U.S.C. Section 706(2)(E) (1988), which provides that agency actions, findings and conclusions in a case reviewed on the record of an agency hearing provided for by statute must be set aside if unsupported by substantial evidence. Section 2149 of the AWA requires a hearing before sanctions may be imposed. 7 U.S.C. Section 2149 (1988).

also Butz v. Glover Livestock Comm'n Co., 93 S.Ct. 1455, 1459 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.").

The Coxes incorrectly assert that the willfulness of their violations of the AWA is a question of law to be reviewed de novo by this court. It is true that the definition of willfulness is a question of law to be reviewed de novo; however; that question is not before us. Nor are we to consider whether, as a matter of law, the Coxes' actions met that definition; rather, we must decide whether the evidence is legally sufficient, under the substantial evidence standard, to support the Department's finding that the violations were willful. There is ample evidence to support this finding. Refusing to permit inspection is obviously willful. The same goes for falsifying records. Of course, people write down the wrong date accidentally on occasion, but when it happens three times within a one-month period and when each time the change makes an illegal act appear legal, an inference of willfulness if justified. The Coxes argue that even if their records were wrong, they themselves did not violate the AWA because the dates in

the records were supplied and recorded by their employees. Section 2139 of the AWA, however, imputes the acts of employees to their employers.[9]

As for the holding violations, there is substantial evidence that they too were willful. The ALJ did not believe Becky Cox's testimony that she believed the information in the records to be accurate. The fact that the Coxes falsified records to cover up the holding period violations shows that they knew they had committed them and suggests that these violations were deliberate.

Finally, the Coxes contend that because they in good faith believed that the puppies were eight weeks old at the time of sale, they did not willfully violate the eight-week age minimum. The Coxes did not find out that the puppies were too young, they say, until they received the American Kennel Club papers showing the date of birth after the puppies had already been shipped. Ignorance is not a

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9 Section 2139 provides: "When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by . . . a dealer . . . shall be deemed the act, omission, or failure of such . . . dealer . . . as well as of such person." 7 U.S.C. Section 2139 (1982).

defense, especially when it is avoidable; the Coxes could have made sure they were complying with the law by waiting for the A.K.C. papers to arrive. See James & Julia Stuekerjuergen, 44 Agric. Dec. 186, 190 (1985) (dealers assumed the risk that the dogs might be underage when they sold them without waiting for papers). Such careless disregard of statutory requirements constitutes willfulness. See id.

Finally, it should be pointed out that for a suspension to be authorized in this case, the only requirement is that at least one of the violations be willful. See 7 U.S.C. Section 2149(a); 5 U.S.C. Section 558(c).[10] The government need not show that all the violations were willful.

B. First Amendment

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10 Because Section 2149(a) authorizes a suspension whenever a licensed dealer "has violated or is violating any provision" of the AWA or any regulation promulgated under it, a suspension could be imposed for a single willful violation of the AWA. The existence of additional violations not shown to be willful does nothing to take away that authorization.

The Coxes next contend that they were punished for exercising their free speech rights: specifically, for their letter to APHIS, for the letters they sent to other dog breeders and pet store owners, and for Lee Cox's insulting remarks to the APHIS inspector. A reviewing court is required to set aside agency action, findings, and conclusions "contrary to constitutional right." 5 U.S.C. Section 706(2)(B). Although questions of constitutional law are reviewed de novo, whether the Department's action was contrary to constitutional right depends on what its motivation was, which is a question of fact. At the administrative level, the Coxes pursued the theory that the Department was retaliating against them for speaking out, but the ALJ and JO were not convinced. We review their implicit finding that the Department's action was motivated by legitimate enforcement concerns under the same substantial evidence standard as other findings of fact.

The Coxes cite as evidence that the Department retaliated against them: (1) the ALJ's mention of Mr. Cox's abusive remarks to the APHIS inspector to his opinion, which was incorporated in the opinion of the JO; and (2) the

testimony given at the hearing by two APHIS inspectors, who discussed the content and impact of the Coxes' mailings. One of them also recommended that a severe sanction be imposed.

We note first that APHIS did not begin investigating the Coxes because of their letters. APHIS had already received complaints and started investigating well before the first newsletter was sent out. Second, the sanctions imposed were fully justified by the Coxes' violations of the AWA. The Coxes have not shown that they were punished for what they said rather than for what they did. That the ALJ quoted Mr. Cox's abusive remarks to the APHIS inspector does not prove otherwise. The quotation serves to emphasize the willfulness of the Coxes' refusal to permit inspection. The Coxes say that the inspectors' testimony in essence advocated that the Coxes be punished for sending out newsletters and that the testimony shows the Department's desire to retaliate against the Coxes for the criticism of its personnel and methods. Rather, the testimony indicates the investigators' concern for the effective enforcement of the AWA. If, by refusing to allow

inspections and publicly criticizing the Department, the Coxes could successfully defy the Department and get away with suspected AWA violations, other kennel owners would follow suit. In fact, one inspector testified that, after the letters and the Coxes' refusal to allow inspection, other dealers were being less cooperative, and some were calling APHIS to ask what was happening with Pixy Pals and why they themselves still had to follow the AWA regulations. Tr. I at 104-06. These circumstances are substantial evidence that the Department imposed sanctions to enforce the AWA, not to punish the Coxes for speaking out against the Department. Therefore, the Coxes' first amendment rights were not violated.

C. Sanctions

Finally, the Coxes argue that the sanctions imposed on them are excessive. They claim that the $12,000 fine is not warranted by the factors enumerated in Section 2149 of the AWA. These factors are: the size of the business; the gravity of the violation; the good faith of the violator; and the history of previous violations, if any. 7 U.S.C. Section

2149(b) (1982). The Secretary is required to consider the appropriateness of the penalty with respect to these factors. Id. Consideration of the first and last factors is straightforward. Given the Coxes' $1 million gross income, a $12,000 fine is not inappropriate. On the other hand, they have no history of AWA violations.

The next factor to consider is the gravity of the violations. Although the violations do not involve cruelty to animals or unsanitary conditions, they are serious. Transporting dogs under eight weeks old endangers their health because their immune systems are not developed enough to withstand the stress of long-distance travel. Tr. I at 68. It also interferes with their psychological development and hence their ability to function when fully grown. Stuekerjuergen, 44 Agric. Dec. at 189. Failure to hold dogs for five days between acquisition and sale also increased the likelihood that they will get sick, prevents proper health monitoring and makes it more difficult to track down stolen dogs. Tr. I at 67-68, 118-19. In addition, the waiting period is necessary to make sure the dogs are healthy, especially if the dealer buys them from an

unlicensed breeder. JO's Decision at 8; Tr. I at 67. Refusal to allow inspection is serious because it prevents detection of AWA violations. Falsification of records is serious by its very nature and also makes enforcement of the AWA difficult.

As to the remaining factor, the Coxes get no credit for good faith. They committed one violation of the AWA, falsifying records, to cover up another, failing to observe the statutory holding period. Their refusal to allow inspection of their premises and records was in defiance of the AWA. While they may not have known that the dogs they sold were underage, they did not bother to find out, despite the fact that they knew of the eight-week minimum age requirement.

We conclude that the sanctions imposed on the Coxes are appropriate in light of the factors set forth in Section 2149(b).

The Coxes further argue that the punishment they received was excessive because it was disproportionate to

that imposed in other AWA cases. It is true that the ninety-day suspension and $12,000 fine are relatively severe; however, the Coxes are not entitled to a sanction no more severe than that applied to others. Spencer Livestock Comm'n Co. v. Department of Agric., 841 F.2d 1451, 1456 (9th Cir. 1988); see Glover, 93 S.Ct. at 1459 ("The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."). It is the Department's job, not ours, to fashion a remedy for violations of the AWA. Because assessing penalties is not a factual finding but the exercise of a discretionary grant of power, Beall Constr. Co. v. Occupational Safety & Health Review Comm'n, 507 F.2d 1041, 1046 (8th Cir. 1974), our review is limited to deciding whether under the applicable statute and facts of the case, the agency made an allowable judgment, Glover, 93 S.Ct. at 1459. An agency's choice of sanction is not to be overturned unless it is unwarranted in law or without justification in fact. Glover, 93 S.Ct. at 1458; Panhandle Coop. Ass'n v. EPA, 771 F.2d 1149, 1152 (8th Cir. 1985). Here, the sanctions imposed are not unwarranted in law; the statute authorizes

suspensions and, at the time of the violations, allowed penalties of up to $1,000 per violation.[11] 7 U.S.C. Section 2149 (1982). The Coxes were fined only about $300 per violation. Nor were the sanctions without justification in fact; there is substantial evidence showing that the Coxes willfully violated the AWA.

III.

Because we find that there was substantial evidence to support the Department of Agriculture's finding that the Coxes' violations of the AWA were willful, that the Coxes were not punished for exercising their first amendment right of free speech, and that the sanctions imposed on them were within the discretion of the Department, we affirm.

A true copy.

Attest: Robert D. St. Vrain

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11 The statute has since been changed to permit a penalty of up to $2,500 per violation. 7 U.S.C. Section 2149(b) (1988).

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	)	AWA DOCKET NO. 434
E. LEE COX and BECKY COX, d/b/a PIXY PALS KENNEL, Petitioners	)	PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE
UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent	)	

Petitioner's petition for rehearing has been considered by the Court and is denied.

April 10, 1991

Order entered at the direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit.